

HARRY WELLINGTON, INTELLECTUAL ICONOCLAST AND SKEPTIC: A TRIBUTE*

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I have to begin on a personal note. It has been a terribly nostalgic occasion for me to remember my beginnings at Yale Law School, reading some of the things that Harry wrote in that era, and reading what both of us have written later on. I believe that Harry's contracts class was the first law school class I ever attended. And I am quite sure it was the first class in which I was called upon. I have spent much of my career at Harry's knee, by his side, and in his mind, reading what he wrote, always with great admiration. There is one exception, however. Harry at one time tried to settle the asbestos morass out of which arose something called the Wellington Agreement, words I can hardly mention without shuddering after having a couple of encounters with this document in the course of discharging my Article III duties. Otherwise, it is nothing but admiration.

My career would not have been what it was without him, although, as I said on another occasion, I did not get the judgeship because of his conspicuous association with the Reagan Administration.

Nevertheless, but for Harry, I very much doubt that I would ever have become a second year law student at Yale Law School. I was not the happiest camper there. And Harry was clearly someone who sustained what was my flagging interest in law. I did not leave, and that evidently was the right decision. Harry has been great at discovering people and launching their careers. There are many others here today, such as Alan Schwartz, who shared my happy experience.

So let me turn to the many sides of Harry Wellington. Harry Wellington, the young teacher, brought to the job not only passion but intellectual iconoclasm and skepticism. He always stressed craft and reasoned argument, both by students and the courts. In commenting upon court decisions, he always stressed the need for courts in a democratic society to give reasoned explanations. Indeed, in reading an article he wrote with Alex Bickel, I was struck by the strength of the

* These remarks were made orally at New York Law School on November 4, 2000.

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criticism they leveled at the Warren Court for failing to justify its decisions, although both of them favored the most publicly criticized decisions, *Brown*¹ in particular. Today it is difficult to find people with intellectual rigor who will criticize a court's work based on its reasoning in decisions with which they agree.

As a teacher and writer, Harry also stressed institutional competence in law making. As much emphasis was placed on who ought to decide the law as on what the actual decision ought to be. He dwelled on the relative competence of state and federal courts and of agencies and private ordering. Finally, although Rick² is correct about Harry's recognition of the need for interdisciplinary study, one of the things that really marked his work was his recognition of the legal process as an independent discipline worthy of study on its own. He conceded that other disciplines inform what we do, but they do not tell us how to do. And that is very important.

Labor law at that time was a natural subject for this kind of scholar, and he was able to bring all of these themes to his work in it. He taught it as a complex and subtle mixture of various questions involving agency as against court, regulation as against private ordering, federal as against state law, court as against arbitrator, and so forth. It was really the perfect subject for him. It had a history of judicial intervention, a very controversial history. It had statutes. It bristled at the time with undecided issues of regulatory law, federalism, administrative competence, and contracts. It was his good fortune to be teaching contracts and labor law as the arbitration issues were working their way through the courts.

It is important for those who are not long in the tooth to understand that labor law at the time was a work in progress. The average labor law casebook every year would have a thick pocket supplement and a new issue would come out in the spring only to have a pocket supplement for the fall. Its ever-changing nature captured the students' interest because there were ongoing decisions going through the courts. There were pre-emption cases, for example, with state and federal law in the presence of the Labor Board, a regulatory agency entitled to deference, although I will add that my experience over the last nineteen years suggests an agency struggling at times to avoid deference. There were also the duty-to-bargain cases, a mixture of regula-

1. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. Reference is to Dean Richard Matasar's introduction in this volume.

tory law and private ordering. They involved a statute that commanded parties to bargain but also emphasized freedom of contract. Those cases arose in a unique contractual setting because, in labor law, you have bargaining parties unlike most contracting parties. Most contracting parties have a choice of dealing with other similar parties if they do not like dealing with one party. Labor law involves parties who find it extremely costly to separate in divorce.

Finally, you had the arbitration cases, again in a unique setting. Labor law involves contracting parties in which the ongoing administration of the agreement is as important or more important than the formation of the agreement. At the time these cases were working their way through the courts, there was a common law background in which many state courts said you could not sue labor unions because they were not legal entities and other courts were denying specific performance.

Now Harry, again, spoke on all of this with an iconoclasm and a skepticism that is not often found in a field that can descend into “us against them” depending on whether you favor employers or unions.

I must say in reflecting and reading, reflecting on those classes and reading his work this week, I was struck by how old-fashioned much of this is. There is today a tendency to downplay craft and reasoned argument in favor of result. Take the organized bar. You can get a pamphlet from the ABA that will list the legal results it prefers on what appear to be hundreds of issues without regard to whether the desired results are consistent with each other, much less consistent with any underlying rationale. You see bar associations giving awards for cases that reached a particular result, again, without regard to whether the judge or the court got there by legitimate or illegitimate or logical or illogical reasons. Discussions of institutional competence are less important to the modern lawyer and to the modern law student and to the modern law professor. They have not entirely disappeared, but one seems to find them more as make-weight arguments in favor of one particular result or another than as serious intellectual concerns.

But one of the things about Harry that I really want to stress—something that also has changed over time, is his faith in the legal process as something worthy of independent study. Now at the time of which I am speaking, we all recognized the importance of other disciplines in law. One, of course, cannot study law and believe that it was entirely uninfluenced by our knowledge about how people behave and

act, about what is efficient, and so forth. But the issue is how and when to adapt other disciplines to law. In legal writing today, there is certainly a shift in the center of gravity from discussing how other disciplines might inform law to believing that they dictate legal results. Yet no regard is given to whether the legal process can actually put the particular teachings to use or whether democratic rule can be made to submit to the supposed dictates of whatever discipline from which the particular commentator receives communion.

And I will say this about law and economics, a field in which I have spent some time: the notion that courts are able to take anything but the most crude form of economics into account and apply it usefully in cases is quixotic. To be sure, today you see legal articles on the efficient market hypothesis that argue about how strong or weak it is but never seem to get to the issue of how strong or weak it has to be to be used to fashion legal rules. The same is true with regard to law and philosophy. The notion that the puzzles of governing and moral philosophy can somehow be solved with some kind of finality by law professors seems to me to be itself quixotic.

But let me now turn to the work Harry and I co-authored, if I might, because, having read it again, I was struck by how relevant it is today. This was a book entitled *The Unions and the Cities*.³ Writing it with Harry was a marvelous experience for me and really gave me a first hand look at his ability to pierce the conventional wisdom. *The Unions and the Cities* was a very mildly stated critique of what was then the conventional wisdom, namely, that the collective bargaining institutions, as established in the private sector, could be moved wholesale to the public sector. Its concluding words were, "Make no mistake about it, government is not just another industry."⁴ Now this was mildly stated, but I understand that the reaction of some to it cost Harry some arbitration work for a while.

The book had a very simple thesis. It assumed that collective bargaining, as established in the private sector, was the right policy. And it asked whether it should be moved to the public sector. The fact that it focused on the cities was significant because, although governmental employees do not necessarily work for cities, big cities do have the most constraints put upon them by public employee unions. They are the most likely to be unionized. They are the most likely to have popu-

3. See HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* (Washington, Brookings Institution, 1972).

4. *Id.* at 202.

lations of minorities and the poor, who are in many ways the employers of public employee unions.

But I think we also focused on the cities because many of those who were pressing most vigorously for transferring collective bargaining wholesale to the cities were also expressing concern over what was perceived then, and is perceived now, as the urban crisis. I will state the arguments of the book simply. In the private sector, there are few products that are subject to what economists call highly inelastic demand. That means there are few products without substitutes that consumers can turn to without great cost, either because the substitute is the identical product or one reasonably similar. This fact imposes constraints on what will result from collective bargaining in the private sector because if consumers do not buy a product, employers and unions will not have a pie to divide. This was so with regard to not only the monetary terms of collective agreements but also to the non-monetary terms asserted by employers at the time under the rubric "managerial prerogatives." The fact is that all of this goes to the bottom line, the price of the product and service. And no union and no employer could reach an agreement that created a price that would substantially decrease sales.

In the public sector, matters are quite different. The elasticity of demand for government services is very different. The elasticity of demand for police, fire, and education, for example, is quite low. Demand is very inelastic. And that is true particularly for the least well-to-do of our citizens who do not have an easy substitute. They cannot move to another area easily or purchase substitutes, such as private guards. Moreover, in the private sector, employers have a bottom line. In the public sector, municipal budgets are enormously complex, with revenue coming from various sources. And, indeed, for various units of employees, municipal elective officials may be able to pass the cost off to other taxpayers. The officials will then offer little resistance to union demands. The book also noted prophetically that elected officials would not have the same long-term vision as investors and private employers. Mayors, for example, do not expect to be mayors after a certain point, and may sign collective agreements that will have their impact far off in the future. There is a line in the book noting that New York City would some day pay the price for the Lindsay Administration's concessions on pensions, money that would have to be paid by a later administration.

Further, the book pointed out that non-monetary issues do not go to the same kind of bottom line as they do in the private sector. In the public sector, they go to the stuff of democracy. The ability to police the police will be very different in a system in which elected officials can freely discipline police than in a system in which discipline is subject to a review by an arbitrator. Seniority in the public sector has similar effects. In the public sector, you do not tell somebody to shape up or get out very often because that cannot be done. For example, a classroom teacher may be put in an administrative job because he or she is no longer teaching well. If you try to cut down on the size of the bureaucracy, however, you encounter a seniority clause that allows the teacher to bump back into the classroom, with a good teacher being laid off. This sort of phenomenon does have a lot to do with the delivery of government services.

Finally, the book noted that, in working democracies, we want any sizable group to be able at some critical point to make its voice heard. It pointed out that public employees generally are such a group and that—particularly where you allow strikes that cause people to clamor for settlements—adding collective bargaining wholesale to the existing powers of public employees could be very dangerous to democratic municipal rule. And today, you see public employees not only with the protection of collective agreements but also with the protection of state laws, such as tenure laws.

Now whatever your views on this, it was, I think, typical of Harry that he did question conventional wisdom. And I think this sort of attitude, with which I was so lucky to be associated over the years, was of enormous inspiration to this law student anyway. And I am very proud to be here and very happy to have been able to say these things about you, Harry. Thank you.